

No. 82333-2

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES ROBERT NASON,

Petitioner.

FILED
SUPREME COURT
STATE OF WASHINGTON
2010 FEB 16 A 10:40
BY RONALD R. CARPENTER
CLERK

BRIEF OF AMICUS CURIAE OF THE
WASHINGTON DEFENDER ASSOCIATION
AND CENTER FOR JUSTICE

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SUPREME COURT
STATE OF WASHINGTON
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INTEREST OF AMICUS CURIAE

The *Washington Defender Association* (WDA) is a statewide non-profit organization with 501(c)(3) status. The WDA has more than a thousand members and is comprised of public defender agencies, indigent defenders, and those who are committed to seeing improvements in indigent defense.

One of the important purposes of WDA is to improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law. WDA advocates on behalf of access to justice issues, including issues relating to legal financial obligations. WDA and its members have previously been granted leave to file amicus briefs on issues relating to these and other issues relating to criminal defense and indigency.

The *Center for Justice* (the Center) is a non-profit, public interest law firm dedicated to creating the experience of justice for those with limited resources. The Center was founded in 1999 and is located in Spokane, Washington. The Center currently devotes itself to the vindication of civil rights, government accountability, environmental health, and poverty law. In the last four years the Center's advocates have devoted significant resources to

improving jail conditions and stopping illegal procedures at the Spokane County Jail. The Center engages in similar work across the state. The Center has been contacted by multiple citizens who report being jailed for failing to have sufficient funds to pay their legal financial obligations—often without any judicial due process prior to being jailed. The Center has worked informally with Spokane County employees to address this problem but seeks a clear legal ruling that would uphold the constitutional protections that should be afforded to our citizens.

ISSUES TO BE ADDRESSED BY AMICUS

- I. Whether the automatic jail (“auto-jail”) policy used by Spokane County violates the due process rights of indigent persons who are unable to meet their financial obligations by failing to afford the necessary due process to determine whether the failure to pay was willful or a result of their indigency
- II. Whether requiring legal financial obligations in all cases with no regard for indigency and with little meaningful ability for review or reduction has created a system that punishes poverty and may increase recidivism

STATEMENT OF THE CASE

This brief relies upon the petitioner's statement of the case, which appears to be supported fully by the record of the proceedings below.

ARGUMENT

The imposition of legal financial obligations (LFOs) without meaningful framework for relief leads to systemic inequalities and increased recidivism. While resulting in very little actual financial gain for the state, imposing financial penalties on individuals as a consequence of criminal convictions reduces the likelihood that defendants will be successful in reentering society without committing new crimes and creates a justice system that is unfair and inequitable. This amicus brief asks the court to find that the Spokane County automatic-jail system, known locally in Spokane as "auto-jail," violates the due process rights of indigent persons who cannot pay their LFOs through no fault of their own and should be struck down as unconstitutional.

- I. Courts must provide for meaningful review of legal financial obligations and an opportunity for relief
- A. Legal financial obligations imposed at sentencing are significant and may be enforced until collected

When a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. RCW 9.94A.760. LFOs are created by statute, unknown at common law. State v. Smits, 152 Wn. App. 514, 216 P.3d 1097, 1099 (2009) (citing State v. Nolan, 98 Wn. App. 75, 78, 988 P.2d 473 (1999), aff'd, 141 Wn.2d 620, 8 P.3d 300 (2000)). The obligations that may be imposed against a defendant include payment of fines, fees, and restitution. RCW 9.94A.760. Certain fees are mandatory while many of the fees and fines may be modified or waived by a court. See, e.g., RCW 43.43.690 (Mandatory DNA Collection Fee); RCW 7.68.035 (Mandatory Victim Penalty Assessment). Likewise, restitution imposed by the court may not be waived, even where the defendant is clearly unable to pay. RCW 9.94A.753. LFOs, including fines and fees which may be waived by a superior court, may not be discharged through bankruptcy.

For offenses committed after July 1, 2000, an order for LFOs may be enforced at any time that the defendant remains under the court's jurisdiction. RCW 9.94A.760(4). A defendant who is unable to pay his or her LFOs faces the further obstacle of immediately accruing interest. RCW 10.82.090.¹ Interest continues to accumulate for all persons who owe LFOs, including those who are incarcerated and have no meaningful way to pay. Interest may be reduced or waived "only as an incentive for the offender to meet his or her legal financial obligations." RCW 10.82.090. The court may reduce, but not waive, the interest that accrues on restitution. Waiver requires a finding by the court that the defendant has made a "good faith effort" to pay and that the interest accrual is causing a significant hardship. See RCW 10.82.090.

A 2008 study found that the median (typical) value of fees and fines assessed per felony conviction in 2004 was \$1,110 and that the mean (average) fee and fine amount assessed was \$1,406. Katherine A. Beckett, et al, Washington State Minority and

¹ The interest rate currently set is 12 percent. See RCW 4.56.110(4) ("[J]udgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. [...] The method for determining an interest rate prescribed by this subsection is also the method for determining the 'rate applicable to civil judgments' for purposes of RCW 10.82.090.").

Justice Commission, The Assessment of Legal Financial Obligations in Washington State 19 (2008). Convictions involving non-violent drug charges were associated with higher median fine and fee amounts than violent felonies. *Id.* This same study found that, three years post-sentencing, less than 20 percent of the fees, fines, and restitution had been paid for roughly three quarters of the cases in the study. *Id.*, at 20.

B. Due process requires a full hearing to determine willful failure to pay before a person may be incarcerated

The imposition of LFOs does not violate the Sixth and Fourteenth Amendments to the United States Constitution where the states employ procedures to ensure that a person is not imprisoned for debt. Fuller v. Oregon, 417 U.S. 40, 50–54 & n. 11 (1974). In Washington, a repayment obligation may not be imposed if it appears that there is no likelihood that the defendant's indigency will end. State v. Curry, 69 Wn. App. 676, 814 P.2d 1252 (1991), aff'd, 118 Wn.2d 911, 829 P.2d 166 (1992). In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose. RCW 10.01.160 (3).

It is fundamentally unfair to imprison a person solely because that person lacks the resources to pay a fine or restitution. Bearden v. Georgia, 461 U.S. 660 (1983); see also, Williams v. Illinois, 399 U.S. 235 (1970). Instead, due process requires that the court find whether the defendant has made all bone fide efforts to pay the fine and yet cannot do so through no fault of his own. Bearden at 672; see also, Smith v. Whatcom County District Court, 147 Wn.2d 98, 112, 52 P.3d 485 (2002) (holding that the court must find that "a defendant's failure to pay a fine is intentional before remedial sanctions can be imposed").

These same principles apply to potential future violations of the defendant's inability to pay LFOs. To be constitutional, the court must determine that, at the time of enforcement, the defendant had an ability to pay and willfully violated the judgment and sentence of the court by not paying court imposed fines and fees. See, e.g., State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997) (holding that the court must inquire into defendant's ability to pay at the time of enforcement).

- C. "Auto-jail" violates due process by imposing incarceration on indigent persons without determining willful failure to pay

Spokane County's system of punishment for failure to pay LFOs violates the due process requirements set out by the U.S. Supreme Court. To satisfy Bearden, the court must make an inquiry that the defendant has willfully violated an order to pay fees and fines and must be sanctioned for that violation. Creating a system that has been described by the parties as "auto-jail," where the only possible relief is to stay a sentence that has been imposed without due process of law, does not pass this test. Instead, the court has created a system where indigent persons who have no realistic way to pay their LFOs instead serve considerable jail time without any meaningful due process.

The facts of the present case make clear that Spokane County is not taking into consideration whether a failure to pay LFOs is *willful*. Mr. Nason had no income other than food stamps and had been unsuccessful in securing employment, despite attempts to try to find work. He was living in his car with his brother. It is unclear what he could have done to begin to make payments on his LFOs. Clearly, collecting aluminum cans, as the state suggested, is not a reasonable alternative and should not be the standard used by the court to determine whether the failure to

pay is willful.² Instead, the court should hold a meaningful hearing in each case after the violation has occurred to determine whether the violation was, indeed, willful.. Where a person is indigent, they should not be sentenced to incarceration automatically for their failure to pay LFOs.

The appellant in this case is not unique. On any given day, out of an average of 1,177 inmates at the Spokane County Jail and the Geiger Corrections Center, sixty to one hundred people are behind bars for failing to pay court fees and fines. Lawrence-Turner, Jody, "Debt to Society: Unpaid Court Fees Can Land Released Convicts Back in Jail," The Spokesman-Review, May 24, 2009 ("It is a modern day debtor's prison," said Spokane County Public Defender John Rodgers). It is unlikely that 5–10 percent of the people held in Spokane County are choosing, willfully, to neglect LFO repayment. Instead, it is far more likely that, because of the lack of due process afforded to defendants under the auto-jail policy, Spokane County has created a system where persons are incarcerated because of their poverty.

² See Amicus Brief of the ACLU at 11, where amicus estimated that the appellant would have to collect approximately 320,000 cans to pay off his court debt, according to www.earthworksrecycling.com.

- II. The requirement of legal financial obligations in all cases with no regard for indigency has created a system that punishes poverty and may increase recidivism
 - A. Imposing LFOs on indigent persons who are unable to pay creates an expensive enforcement system that does not help in holding offenders accountable

In Washington, LFOs are imposed in every case where a person is convicted in superior court of a felony. RCW 9.94A.760. The national estimate for those accused of crimes is that 80% are indigent. Smith, Steven K., and Carol J. DeFrances. Indigent Defense. Washington, D.C.: Office of Justice Programs, 1996. According to the Washington State Sentencing Guidelines Commission and Administrative Office of the Courts, 80 percent is statistically similar to those who are unable to pay their LFOs in a meaningful time period. Beckett, The Assessment of Legal Financial Obligations in Washington State at 21 (finding that less than 12 percent had been able to pay the fees and fines within three years of conviction and over half had been unable to pay anything at all).

LFO REPAYMENT, WASHINGTON STATE SUPERIOR COURT 2004 –2007

Percent of Fees & Fines Paid	Percent of Convictions	Percent of Restitution Paid	Percent of Convictions
0%	52.8%	0%	49.5%
1-20%	24.4%	1-20%	22.2%
21-40%	5.5%	21-40%	5.1%
41-70%	4%	41-70%	7.3%
71-90%	1.4%	71-90%	1.4%
91-100%	11.9%	91-100%	14.5%
	100%		100%

Washington State Sentencing Guidelines Commission and Administrative Office of the Courts

The disturbing inference that can be made from this is that Washington has created a system whereby those who are poor and indigent are being punished not only for the crime that they committed, but further punished as they become obliged to pay the 12 percent compounded interest that continually accrues. For most, even the minimum legal financial obligation that can be imposed under law can become a debt under which they can never escape.

The difficulty of collecting LFOs from indigent people is also significant because of the amount of money that the state is spending to enforce payment of the LFOs. In the past decade, the government has enacted several legislative schemes in order to

assist counties in the collection of LFOs. See RCW 9.94A.760.

These reforms have not resulted in significant recoupment for the state and have instead become an unfruitful expense to taxpayers.

Heller, Wendy, Poverty: The Most Challenging Condition of Prisoner Release, 13 Geo. J. Poverty Law & Pol'y 219, 224–40 & n.12 (Summer 2006).

Spokane County has attempted to ameliorate some of these expenses by eliminating due process rights associated with the collection of LFOs. Even then, Spokane County spends a remarkable amount of money on enforcement by incarcerating those who are unable to pay. In fact, the Spokane County Public Defender's Office estimates that the incarceration of prisoners who are returned to jail for non-payment of LFOs costs \$3 million per year. The Spokesman-Review, Legal Financial Obligations, May 24, 2009. These expenses would not likely result if the court required Spokane County to engage in meaningful due process because many of those caught in the automatic jail scheme are unable to pay LFOs due to indigency—not willful neglect—just like the appellant in the present case.

B. Requiring LFOs for indigent persons with no meaningful opportunity for review or reduction in

obligations is unfair and has created a system of inequality and state-wide disparity

One of the goals of the Sentencing Reform Act is to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences. Washington State Sentencing Guidelines Commission, Adult Sentencing Manual, I-vii (2008). To a large degree, the Sentencing Reform Act has been able to achieve this goal with regard to the amount of time that a defendant serves for a particular charge, based upon its seriousness and the offender's criminal history. See RCW ch. 9.94A. The Washington State Sentencing Guidelines Commission studies sentence disparity in order to determine whether defendants are being treated fairly throughout the state. See, e.g., Washington State Sentencing Guidelines Commission, Disproportionality and Disparity in Adult Felony Sentencing (2008). While disparity has not been eliminated, the guidelines have resulted in the fact that the majority of the sentences fall within the standard range for the offender. Id. at 3.

The same cannot be said for the amount of fines and fees that are imposed upon conviction. Instead, LFOs vary greatly by "gender and ethnicity, charge type, adjudication method, and the

county in which the case is adjudicated and sentenced.” See Beckett, The Assessment of Legal Financial Obligations in Washington State at 32. What was intended to be a system where all persons who commit same or similar offenses are charged equally has instead, for LFOs, become disparate on factors independent to sentencing. Id. at 69. (“The extent of this variation is striking given legislative efforts to reduce variation in confinement and supervision sentences.”). Spokane County’s system of “auto-jail” only makes this disparity worse.

C. The imposition of LFOs may lead to higher recidivism rates and is in conflict with the goal of integrating offenders back into society

Of even more concern is the fact that LFOs may lead to higher recidivism rates. According to the Department of Corrections, only 18 percent of offenders have a high school degree and 47 percent have GED Certificates, where 71 percent of male offenders score below a ninth grade level. Likewise, 50 percent of offenders were unemployed prior to incarceration and 85 percent need job-skill training. Indeed, many of the offenders struggle with mental health and drug problems, making them ill equipped to deal with the challenges of re-entry. See generally,

Washington State Department of Corrections, The DOC Re-Entry

Initiative: Smart on Crime (2006).

Imposing significant financial penalties interferes with the goal of securing a crime-free life for defendants. LFOs only exacerbate the problems that those released from confinement must face and may, in fact, lead to increased recidivism.

It therefore appears that the legislative effort to hold offenders financially accountable for their past criminal behavior reduces the likelihood that those with criminal histories are able to successfully reintegrate themselves into society. Insofar as legal debt stemming from LFOs makes it more difficult for people to find stable housing, improve their occupational and education situation, establish a livable income, improve their credit ratings, disentangle themselves from the criminal justice system, expunge or discharge their conviction, and re-establish their voting rights, it may also increase repeat offending.

Beckett, The Assessment of Legal Financial Obligations in

Washington State at 74. In turn, the state is forced to face future prosecutions, incarceration, and expense.

Likewise, Spokane's system of "auto-jail" for failure to pay LFOs without any meaningful review to establish willfulness may contribute to increased recidivism. Rather than enabling those convicted of crimes to become contributing members of society, the

routine incarceration without process results in more people incarcerated for longer periods of time. This finding directly conflicts with the goals of the SRA, leads to more incarceration in Spokane County, and may, in fact, increase the likelihood of reoffending.

CONCLUSION

A person may only be jailed for failure to pay LFOs when the failure to pay is willful. The automatic-jail sentence system of Spokane County fails to take into account whether a failure to pay is willful and, as such, violates the due process rights of the accused.

DATED this 8th day of February, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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